

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000287-001 DT

07/12/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT  
T. Melius  
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

SHERYL LYNN VILTRAKIS (001)

LAURIE A HERMAN

PHX MUNICIPAL CT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case No. 14021185-02 and-03**

Defendant Appellant Sheryl L. Viltrakis, (Defendant) was convicted in the Phoenix Municipal Court of DUI (having an alcohol concentration greater than .08 within two hours of driving). Defendant contends the trial court erred. For the reasons stated below, the Court reverses the trial court's judgment about the admissibility of the HGN test but finds the error was not fundamental error. The Court affirms the sentence imposed.

**I. FACTUAL BACKGROUND.**

On April 16, 2010, Defendant was stopped for travelling at 62 miles per hour in a 50 mile per hour zone. Two police officers—Officer Schabron and Officer Lang—were involved in the stop and subsequent arrest. Defendant was charged with two crimes: (1) driving a motor vehicle while under the influence of intoxicating liquor and (2) having an alcohol concentration of 0.8 or more within two hours of the time of driving. Defendant went to trial and was acquitted on the first offense but convicted on the second offense.

At trial,<sup>1</sup> Officer Schabron testified he observed Defendant with bloodshot, watery eyes and having the odor of alcohol on her breath when he first stopped her. Although he was not certified to perform HGN tests at the time of the stop,<sup>2</sup> Officer Schabron wanted to do the HGN test. (This was one of the last tests Officer Schabron performed before achieving his HGN

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<sup>1</sup> Transcript of August 30, 2010, August 31, 2010, and September 1, 2010, bench trial.

<sup>2</sup> *Id.* at p. 78, ll. 4–8; p. 160, ll. 8–14.

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certification later that same day.)<sup>3</sup> Officer Lang, an HGN certified officer, stood behind Officer Schabron<sup>4</sup> while Officer Schabron administered the HGN test. Officer Schabron testified that he could not recall anywhere in his training where he was taught that it was acceptable for him to do a HGN test before he was certified to do so.<sup>5</sup> He also could not state exactly where Officer Lang was standing and did not know which side Officer Lang was on.<sup>6</sup>

Officer Lang testified about his own HGN qualifications and stated he watched Officer Schabron while Officer Schabron administered the HGN tests.<sup>7</sup> Officer Lang stated he watched Defendant's eyes as the test was done and he saw the impairment cues.<sup>8</sup> Officer Lang further testified he would have repeated the HGN test if he needed clarification but he thought the test was properly administered.<sup>9</sup> Officer Lang admitted it was not ideal for one person to conduct the HGN test while another looked over the shoulder but said he did not believe this deviated from standardized requirements.<sup>10</sup> Officer Lang further stated he never said Officer Schabron was qualified to do the test—but he believed Officer Schabron administered the test “correctly enough for me to be able to get the clues that I needed and I watched and I observed.”<sup>11</sup> He further stated that following the initial HGN training, police officers are required to have logged 35 tests before the officer can be certified and explained “the main way people do that or officers do that is to go out in the field and do actual stops.”<sup>12</sup> On cross-examination, however, Officer Lang said that he was not able to testify in court about any clues of impairment prior to being qualified. Officer Lang also testified—based on his experience—that four cues of impairment usually correlate with a high probability that the affected person has a blood alcohol in excess of 0.8.<sup>13</sup>

Chester Flaxmayer—a forensic toxicology expert—testified for the defense. After describing the protocol used to qualify/certify a person to perform HGN tests he stated a person would need to be certified/qualified for that person's administration of the HGN test to be scientifically accepted.<sup>14</sup> Although Mr. Flaxmayer agreed the HGN findings would be the same for an officer who observed the test but did not move the stimuli, he suggested Officer Lang viewed the Defendant from a different angle during this test.<sup>15</sup> As a result, Officer Lang would need to

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<sup>3</sup> *Id.* at p. 80, ll. 19–20; p. 140, ll. 11–15.

<sup>4</sup> *Id.* at p. 87, ll. 12–14.

<sup>5</sup> *Id.* at p. 92, ll. 10–23.

<sup>6</sup> *Id.*, at p. 94, ll. 21–25; p. 95; and p. 113, ll. 17–25.

<sup>7</sup> *Id.*, p. 176 ll. 4–7.

<sup>8</sup> *Id.*, p. 176, ll. 15–16; p. 179, ll. 4–6.

<sup>9</sup> *Id.*, p. 176, ll. 15–25

<sup>10</sup> *Id.*, p. 195, ll. 12–25.

<sup>11</sup> *Id.*, p. 208, ll. 11–13.

<sup>12</sup> *Id.*, p. 231, ll. 2–10.

<sup>13</sup> *Id.*, p. 227, ll. 6–10.

<sup>14</sup> *Id.* p. 287, ll. 10–14.

<sup>15</sup> *Id.*, p.297, ll. 21–25.

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estimate the angle of onset because he was not standing in the middle.<sup>16</sup> He also testified that he knew of no studies validating a technique where one person administered the HGN test and another person determined the cues.<sup>17</sup> Mr. Flaxmayer reviewed Officer Schabron's training log and determined the officer had only done 27 training gazes prior to administering the HGN to Defendant.<sup>18</sup>

Defendant testified and stated Officer Lang was standing to the side when Officer Schabron administered the HGN.<sup>19</sup> This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

*A. Did the Trial Court Abuse Its Discretion in Admitting the HGN Test Taken by an Uncertified Police Officer.*

This appeal centers on whether Officer Schabron had sufficient expertise to administer the HGN test at the time he stopped Defendant. In determining the standard to be used in an HGN case, our Supreme Court, in a landmark decision, established the following requirement:

We conclude that the testimony presented at the evidentiary hearing regarding the reliability of the HGN test establishes that in the hands of a trained officer the test is reasonably trustworthy and may be used to help establish probable cause to arrest.

*State v. Superior Court In and For Cochise County*, 149 Ariz. 269, 276, 718 P.2d 171, 178 (1986).<sup>20</sup> In analyzing how and when HGN evidence should be admissible, the court continued and stated:

We therefore hold that, with proper foundation as to the techniques used and the officer's ability to use it, testimony of defendant's nystagmus is admissible on the issue of a defendant's blood alcohol level as would be other field sobriety test results on the question of the accuracy of the chemical analysis.

*Id.* at 279, 718 P.2d at 181 (citation omitted). The Court concluded:

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<sup>16</sup> *Id.* p. 298, ll. 9-19; 299; p. 300, ll. 1-9.

<sup>17</sup> *Id.* p. 288; p. 289, ll. 1-7.

<sup>18</sup> *Id.* p. 315, l. 25. Prior testimony established the Officer would need to complete 35 training gazes and then do five additional gazes in front of an instructor and maintain an 80% accuracy rate in order to be certified. Transcript, p. 286, ll. 1-9. Consequently, Officer Schabron had only accomplished an approximate 75% of the training gazes needed for certification at the time he administered the HGN to Defendant.

<sup>19</sup> *Id.*, p. 348, ll. 11-12; p. 372, l. 23.

<sup>20</sup> This case is known as the *Blake* case.

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We find that the horizontal gaze nystagmus test properly administered by a trained police officer is sufficiently reliable to be a factor in establishing probable cause to arrest a driver for violating A.R.S. 28–692(B). We further find that the horizontal gaze nystagmus test satisfies the *Frye* test for reliability and may be admitted in evidence to corroborate or attack, but not to quantify the chemical analysis of the accused’s blood alcohol content. It may not be used to establish the accused’s level of blood alcohol in the absence of a chemical analysis showing the proscribed level in the accused’s blood, breath or urine.

*Id.* at 280, 718 P.2d at 182. In *State ex rel Hamilton v. City of Mesa*, 165 Ariz. 514, 799 P.2d 855 (1990), the Arizona Supreme Court further explained its holding in *State v. Superior Court In and For Cochise County*, *id.* In *Hamilton*, *id.*, the Arizona Supreme Court limited the ability of the police to testify about the amount of alcohol present in a Defendant’s blood based solely on an HGN test. The Court determined police officers may not testify about accuracy in estimating blood alcohol from the HGN test or estimate whether a defendant’s blood alcohol was either above or below 0.10% if the State did not conduct corroborating chemical tests. Instead, in those situations, the officer’s testimony is limited to “describing the results of the test and explaining that, based on the officer’s experience, the results indicated a neurological impairment, one cause of which could be alcohol related.” *Hamilton*, *id.*, at 517, 799 P.2d at 858. Consequently, HGN evidence, when introduced, is subject to limitations. Because the HGN test cannot be independently confirmed, it can only be challenged through cross-examination. Thus, while the HGN test may be admissible, the weight given to this test may be small.

In this case, the State introduced HGN evidence without demonstrating the officer who administered the test was properly trained. Officer Schabron was not certified/qualified to administer HGN tests at the time he administered the test to Defendant. Although he was undergoing training, and was certified/qualified later that same day, at the precise time he administered the test he was not legally allowed to do so. This Court recognizes the need for officers to be trained and get training in the field. However, that does not excuse the legal requirement that the HGN be performed by a trained officer as opposed to an officer in training. Testimony and Officer Schabron’s own log establish he had not done the required number of gazes when he undertook to do the test on Defendant.<sup>21</sup> There was no showing he had achieved the required 80% proficiency on his gaze samples at the precise time he administered Defendant’s test.

The State failed to produce evidence that the test could legally be performed by a combination of officers—one administering the test and the other observing. Had the police officers chosen, Officer Lang—who was certified/qualified at the time—could have independently

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<sup>21</sup> Assuming the log number of 27 is correct, Officer Schabron has administered approximately 75% of the gazes he needed for qualification/certification at the time he administered the HGN to Defendant.

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administered the test and corroborated Officer Schabron's finding. This was not done. The trial court admitted the HGN evidence over Defendant's objection.

Appellate courts review a trial court's decision on whether to admit expert testimony for an abuse of discretion. *State v. Bigger*, \_\_\_ Ariz. \_\_\_, \_\_\_P.3d \_\_\_, 2011 WL 2322619, 609 Ariz. Adv. Rep. 4 ¶23 (Ct. App. 2011). As the Court of Appeals stated in *State v. Campoy*, 214 Ariz. 132, 149 P.3d 756 ¶ 6 (Ct. App. 2006):

We begin by recognizing it is the trial courts' traditional prerogative and duty to monitor the admission of evidence in criminal trials and to ensure the probative value of admitted evidence is not substantially outweighed by unfair prejudice to the defendant.

Undisputedly, evidence about HGN tests is admissible. However, the HGN test results can be limited. For example, HGN test results cannot be used to quantify or estimate a person's blood alcohol in the absence of a chemical test. *Campoy*, *id* at 135, 149 P.3d 759. Similarly, HGN tests must be properly administered.<sup>22</sup> In this case, the circumstances surrounding the HGN's administration cast doubt as to the reliability of the test information. As the HGN test was impermissibly administered, the trial court erred in allowing the HGN results at trial. This Court does not know the weight the jury gave this evidence.

*B. Did Admitting the HGN Test Result in Fundamental Error.*

Having determined the HGN testimony should not have been admitted, this Court is next confronted with the effect of the error and must determine if admitting the HGN testimony was a fundamental error. Error is fundamental when—viewed in the context of the trial—it is of such dimensions that it was impossible for a defendant to have had a fair trial. *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). The Arizona Supreme Court described fundamental error as follows:

We have described fundamental error as error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.

*State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984) (citation omitted). Accord, *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 ¶ 7 (2008). This Court finds no fundamental error in this case. Defendant had—and took advantage of—the opportunity to cross-examine both police officers about the HGN testimony. Additionally, this case did not rest solely on the officers' HGN testimony. Both officers described Defendant as having bloodshot eyes and an odor of alcohol. Although the officers elected to forego other field sobriety tests, Defendant

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<sup>22</sup> For purposes of this opinion, this Court determines that certification/qualification indicates proper training to be able to administer the HGN tests to those accused of driving while impaired/ under the influence.

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admitted to having three drinks prior to driving. Defendant also had a blood alcohol reading in excess of 0.8. The jury heard contrary explanations for Defendant's red eyes—she was crying—and heard testimony about how topical agents might have affected or contaminated Defendant's blood alcohol. It then became the jury's province to weigh all of these factors before reaching a verdict.

The jury verdict in this case substantiates the jury's ability to weigh the significance of the HGN testimony. Firstly, the jury acquitted Defendant of the first charge—driving a motor vehicle while under the influence of intoxicating liquor—and only convicted her of the second offense—having an alcohol concentration of 0.8 or more within two hours of the time of driving. Even ignoring the HGN evidence, the jury could reasonably conclude Defendant was guilty of having a blood alcohol greater than 0.8 within 2 hours of driving based on her blood alcohol reading. Additionally, the police officer had a basis for the blood test based on her outward physical symptom, her admission of alcohol consumption, and her speeding.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Phoenix Municipal Court erred when it ruled the HGN test results were admissible in this case. This Court further concludes the error was not fundamental error.

**IT IS THEREFORE ORDERED** reversing in part—the determination to admit the HGN evidence—and affirming in part—the finding of guilt and the sentence—the judgment of the Phoenix Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

JUDICIAL OFFICER OF THE SUPERIOR COURT

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